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Tenn. 99 (jitney-bus case); *F. & M. Coöp. Tel. Co.* v. *Boswell Tel. Co.*, 187 Ind. 371, but it does not follow that relief will be given if the rival utility has been properly authorized to do business and is acting within such authority. *New Hartford Water Co.* v. *Village Water Co.*, 87 Conn. 183; nor if the complaining company has not itself been lawfully authorized to furnish service. *Rural Home Tel. Co.* v. *Ky. and Ind. Tel. Co.*, 128 Ky. 209. This protection from injury to its business by competition not lawfully authorized is like the analogous cases in which the legality of a differentiation in unit rates for different kinds of uses of the same utility—*e. g.*, the rates for gas used for fuel, or power, or light—is made to depend upon whether the different classes of users are in competition so that the discrimination in rates might injure the business of those charged the higher rate. *Boerth* v. *Detroit City Gas Co.*, 152 Mich. 654. It is certain that many statutes have been passed applying to private and not to municipal corporations, but which the legislature might have applied alike to both. It is usually a matter that addresses itself to legislative discretion, and the courts will interfere only in a clear case of abuse of that discretion. *Feemster* v. *Tupelo*, 121 Miss. 733. In any case, there can be no doubt that the supreme legislative body of the state has the power, if it chooses to exercise it, of regulating charges for the service of municipally owned utilities. *Bartlesville* v. *Corporation Com.* (Okl., 1921), 199 Pac. 396, and it would seem to follow that it can if it prefers leave the fixing of rates to the municipality itself. The principal case so holds. It would be strange indeed if the legislature may fix rates of a private corporation for a public service, and may allow a municipality to fix its own rates for service furnished by it, and yet it should turn out that a statute so providing should be found unconstitutional as a denial of equal protection of the laws. Neither the Illinois nor the federal supreme court found it necessary to cite authorities on this point.

REMAINDERS TO A CLASS—WHEN CLASS DETERMINED.—There was a legacy "to my sister for life and at her death the amount to be equally divided between her children." At the time of the testator's death the sister had four children living, but one died during the mother's life, leaving two children of her own who are plaintiffs in this action. *Held*, the remainder vested at the death of the testator and the plaintiffs are entitled to one-fourth of the property. *Powell* v. *McKinney* (Ga., 1921), 108 S. E. 231.

The intention of the testator or grantor should control as to when the class is to be determined and the remainders vested, providing his intention does not conflict with the rule against remoteness or other absolute rules of law. The courts generally say his intention does control. *Crossley* v. *Leslie*, 130 Ga. 782. But the courts' interpretation of the words used is likely to be nearly as rigid as an absolute rule of law. In accordance with the rule that the law favors vested interests, it is said the instrument will, if possible, be construed to show an intent to determine the class as of the time when the instrument takes effect—*i. e.*, when the deed is delivered or the testator dies. 1 TIFFANY ON REAL PROPERTY (Ed. 2) 497. In grants or devises of the type "to A for life" and "then," or "upon," or "after," or

"at" his death "to my children" or "to his children," etc., the authorities very generally support the instant case. The class is determined as of the time when the instrument takes effect and the remaindermen have a vested interest from that time. *Ritzman's Estate* (Cal., 1921), 199 Pac. 783; *Sherley* v. *Sherley* (Ky., 1921), 232 S. W. 53; *Holmes* v. *Holmes* (Mich., 1921), 183 N. W. 784. Such interests, however, are not vested for all purposes. For instance, they are within the rule against remoteness. GRAY, RULE AGAINST PERPETUITIES, § 83. As is said in *Birdsall* v. *Birdsall,* 157 Ia. 363, when the remainder is to all the members of the specified class, and the language is not such as to prevent construction by the court, the remainder will be held to vest when the instrument takes effect. However, if no member of the class is then in existence, the remainder will be contingent until there is such member in existence, when it will vest in that member, subject to being opened to let in others until the time for distribution. *Carver* v. *Jackson,* 4 Peters 1, 90. "To A for life, then to my heirs" or "next of kin," generally gives a vested interest from the time the instrument takes effect, *Avinger* v. *Avinger* (S. C., 1921), 107 S. E. 26; but when such remainder is subject to the condition "if A die without issue," there is a sharp conflict of authority. ANN. CAS. 1917A 863-4. In *Meyer* v. *Matthews* (S. C., 1921), 108 S. E. 174, upon such a devise the remainder was held to vest at the testator's death, but subject to divestment. For the "New York rule" as to divesting remainders once vested, see 4 KENT COMMENTARIES (Ed. 14) 202-5. For an excellent analysis of that rule, see *In re Moran's Will,* 118 Wis. 177. If the remainder is to part of a class, as, for instance, to the survivors, there is great difficulty and sharp conflict. Some of our courts follow the early English decisions and hold that words of survivorship relate to the death of the testator unless there is a plain intent to apply them to a later period; that is to say, the class is determined as of that time. *Ball* v. *Holland,* 189 Mass. 369; *Jameson* v. *Jameson,* 86 Va. 51; *Ross* v. *Drake,* 37 Pa. St. 373; *In re Twaddell,* 110 Fed. 145. But more generally in recent decisions if the words are open to construction they are held to relate to the termination of the particular estate, and the remainder vests at that time. *In re Moran's Will, supra; Sullivan* v. *Garesche,* 229 Mo. 496; *Sinton* v. *Boyd,* 19 Ohio St. 30; *In re Winter's Estate,* 114 Cal. 186; *Bell* v. *Brinson* (Ga., 1921), 108 S. E. 47; 2 JARMAN ON WILLS (Am. Ed. 5) 674. The latter rule would seem the better in that it is more likely to give effect to the actual intent of the testator, and is not opposed to sound public policy. When the limitation is to such members of the class as reach a certain age, sustain a given character, do a particular act, etc., there being no distinct gift to the whole class, it is generally stated that the interest is contingent until some member of the class qualifies, when it becomes vested in him, subject to being opened to let in others. *Coggins' Appeal,* 124 Pa. St. 10; *McArthur* v. *Scott,* 113 U. S. 340. The general rule as to remainders, that if the postponement of possession and enjoyment is merely for the convenience and benefit of the estate, or to let in other interests, and not for reasons personal to the remainderman, the remainder vests at the death of the testator, while if postpone-

ment is annexed to the substance of the remainder and is personal to the remainderman, the remainder is contingent until the time set for distribution, applies to remainders to a class. *Thomas* v. *Thomas,* 247 Ill. 543.

SALES—RESCISSION OF CONTRACT BECAUSE OF FAILURE OF SELLER TO FULFILL WARRANTY.—The parties entered into a contract under which the defendant was to furnish and install two gas engines of 150 brake horsepower each. Relying on the defendant's promise that the engines would be of this power, the plaintiff made a deposit. The engines the defendant had built according to the plaintiff's plans in fact tested only 140 horse-power. Because of this discrepancy in their capacity the plaintiff refused to receive the engines at the freight house. He sued to recover his desposit. In a cross-complaint the defendant alleged that before he shipped the engines he told the plaintiff of the shortage of their capacity, but that the plaintiff said for him to ship them anyway. What finding of fact was made as to this allegation does not appear in the report. Judgment was given for the plaintiff on the ground of failure of consideration. *Mahony* v. *Standard Gas Engine Co.* (Cal., 1921), 202 Pac. 146.

The general rule is that when title has passed, if the chattel fails to come up to warranties the buyer's only remedy is an action for damages. *Street* v. *Blay,* 2 B. & Ad. 456; *Lyon* v. *Bertram,* 20 How. (U. S.) 149; *Crabtree* v. *Kile,* 21 Ill. 180; *Hoover* v. *Sidener,* 98 Ind. 290. But where a warranty is made with intent to defraud, and damage occurs, it is ground for rescission. *Montgomery* v. *Bucyrus Mach. Works,* 92 U. S. 257. Led by Massachusetts, some jurisdictions hold that in case of a "serious failure of consideration" through breach of warranty the buyer can return the property and be freed from liability for the purchase price. *Bryant* v. *Isburgh,* 13 Gray 607; *Kuntzman* v. *Weaver,* 20 Pa. St. 422; *Scranton* v. *Tilley,* 16 Texas 183; *Ruby Carriage Co.* v. *Kremer,* 26 Ky. Law Rep. 274. Although in the principal case the language used by the court might indicate a tendency to follow the Massachusetts rule allowing rescission of sale for breach of warranty, the holding on the facts does not give sound support to this doctrine. If the court in fact made an unreported finding that the plaintiff asked that the machines be shipped after he knew of their defect, even the courts following the Massachusetts rule would have held that he thereby waived his right to return the chattel for that breach of warranty. *Aultman-Taylor Co.* v. *Ridenour,* 96 Iowa 638. If no such finding was made, the plaintiff merely recovered under the doctrine recognized alike by the courts that allow rescission and those that do not, that in the case of a tender of something different than called for by the executory contract of sale the buyer can reject what is tendered and recover any money he has paid in advance. *Pope* v. *Allis,* 115 U. S. 363.

TAXATION—STOCK DIVIDENDS TAXABLE AS INCOME.—In 1917, the complainant stockholders in the Bronx Company received a "stock dividend" declared against appreciation of capital assets. *Held,* such "stock dividends"